

CLOSED

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT**

JOHN HOCHBERGER,
Plaintiff,

vs.

PERMA PURE, LLC, a New Jersey
limited liability company;
MATTHEW POWERS, an
individual; and DOES 1 through 10,
Inclusive,
Defendants.

Case No. CV14-1215-R-MAN

JUDGMENT

Hon. Manuel L. Real

Complaint Filed: February 19, 2014

HIRSCHFELD KRAEMER LLP
ATTORNEYS AT LAW
SANTA MONICA

1 The Court has considered the evidence and papers submitted in support of
2 Defendants PERMA PURE, LLC'S and MATTHEW POWERS' Motion for
3 Summary Judgment, Or in the Alternative, Partial Summary Judgment. Plaintiff
4 John Hochberger failed to respond, and neither he nor his counsel appeared at the
5 January 5, 2015 hearing on Defendants' Motion. After due consideration, the
6 Court finds that Plaintiff has failed to present a genuine issue as to any material
7 fact and that Defendants Perma Pure, LLC and Matthew Powers are entitled to
8 judgment as a matter of law, as set forth below:

9 Summary judgment must be granted if the movant shows that there is no
10 genuine dispute as to any material fact. Movant is then entitled to judgment as a
11 matter of law. Fed. R. Civ. Proc. 56(a).

12 To prove his First through Fifth Causes of Action claiming the non-payment
13 of wages for all hours worked, Plaintiff must show that that Perma Pure knew, or
14 should have known, of the work. *Forrester v. Roth I.G.A. Foodliner, Inc.*, 646
15 F.2d 413, 414 (9th Cir. 1981). Plaintiff presents no evidence that Perma Pure
16 knew, or should have known, of the hours he worked. Plaintiff was located in
17 California while defendants were located in New Jersey. Plaintiff had no
18 scheduled hours and no set number of hours. In fact, Perma Pure did not have any
19 idea how many hours he was working on any particular day. [Plaintiff's
20 Deposition, at pp. 55 and 57.] In the absence of actual or constructive knowledge
21 concerning his hours, the Court grants summary judgment on these causes of
22 action.

23 Further, Plaintiff cannot maintain his First through Fifth Causes of Action
24 for non-payment of wages if he qualifies for the administrative exemption to the
25 wage and hour laws. *Harris v. Superior Court*, 53 Cal. 4th 170, 178 (2011). The
26 California Labor Code and the FLSA both exempt from overtime compensation
27 "administrative" employees who meet the test of the exemption. An employee
28 qualifies for the administrative exemption under the California Labor Code if he:

(1) performs “office or nonmanual work directly related to management policies or general business operation” of his employer or customers; (2) customarily and regularly exercises “discretion and independent judgment;” (3) performs “under only general supervision;” (4) is primarily engaged in duties that meet the test of the exemption; and (5) earns twice the state’s minimum wage. *D’Este v. Bayer Corp.*, 492 F. Appendix 721, 722-23 (9th Cir. 2012). Likewise, an employee meets the test for the administrative exemption to the FLSA if: (1) he earns a salary of at least \$455 per week; (2) his primary duty is the performance of nonmanual work directly related to the general business operation of the employer or the employer’s customers; and (3) his primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 20 CFR § 541.200.

The state and federal standards are construed in the same manner. *Harris, supra*, 53 Cal. 4th at 180. And Plaintiff easily passes both tests for the administrative exemption. First, Plaintiff sold as opposed to produced Perma Pure’s specialized products. Second, he exercised discretion in researching and contacting customers. Third, he lived 3,000 miles away from his employer and the supervisor and set his own schedule without their input. Fourth, his primary duties qualified for the exemption. Fifth, he earned far in excess of federal and state minimum wage. Plaintiff’s exempt status also supports the grant of summary judgment on these causes of action.

With respect to Plaintiff’s second Fifth Cause of Action¹ for breach of contract due to Perma Pure’s failure to count the Ikaria sale toward Plaintiff’s commission, his right to commissions was dependent upon the goods being actually shipped prior to his termination. *See Division of Labor Standards Enforcement v. Dick Bullis, Inc.*, 72 Cal. App. 3d Supp. 52, 56 (1977) (a mere

¹ There are two “Fifth Causes of Action” in Plaintiff’s Complaint.

1 order that has not been physically delivered does not effectuate a sale to give rise
2 to the right to commissions). Perma Pure follows a policy of not paying
3 commissions until the product is shipped on the ground that the customer can reject
4 the sale after it is booked. [Declaration of Matthew Powers, ¶ 5.] Accordingly, the
5 Court grants summary judgment on the breach of contract claim.

6 Finally, with respect to the Sixth and Eighth Causes of Action² founded on
7 Matthew Powers' statements of a false reason for the trip to New Jersey on
8 December 3, and Perma Pure's failure to pay for any work on December 4,
9 wrongful termination of employment ordinarily does not give rise to a cause of
10 action for fraud or deceit, and Plaintiff must have damages distinguished from the
11 termination itself. *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 1178 (1993);
12 *Schaldach v. Dignity Health*, 2013 U.S. Dist. LEXIS 73553, at *15 (E.D. Cal.
13 2013). Thus, the Court grants summary judgment on the fraud and negligent
14 misrepresentations Causes of Action.

15 THEREFORE, IT IS NOW ORDERED, ADJUDGED, AND DECREED
16 that judgment be entered as follows:

17 Plaintiff shall take nothing by his Complaint and the Complaint is dismissed
18 in its entirety, with prejudice. Defendants are entitled to their costs pursuant to
19 Local Rule 54-1 as the prevailing parties in this action.

20 IT IS SO ORDERED.

21
22 Dated: February 4, 2015



23 The Honorable Manuel L. Real
24 United States District Court
25 Central District of California
26
27

28 ² There is no "Seventh Cause of Action" in Plaintiff's Complaint.

1 Respectfully submitted by:

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3 Dated: February 6, 2015

HIRSCHFELD KRAEMER LLP

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5 By: /s/ Sayaka Karitani
Sayaka Karitani

6 Jerry S. Sallee (Ohio Bar #0013303)
7 DINSMORE & SHOHL LLP

8 Attorneys for Defendants, PERMA PURE,
9 LLC and MATTHEW POWERS

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